RECENT DECISIONS.

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ADJOINING LANDOWNERS—LATERAL SUPPORT—IMPLIED GRANT.—The defendant had acquired by eminent domain proceedings a part of the plaintiff's land for a railroad right of way, damages being assessed for the land so taken. The plaintiff claimed additional compensation for as much more of his land as would be necessary to support the railroad when completed. *Held,* the plaintiff's conveyance carried with it an implied grant of lateral support for the land in its improved state for which he was entitled to compensation. *Manning* v. *N. J. Short Line R. Co.* (N. J. 1910) 78 Atl. 200. See Notes, p. 275.

ADMIRALTY—COLLISION—APPORTIONMENT OF DAMAGES.—Two vessels, both at fault, collided. The owner of one of the cargoes sued the owner of the other vessel. *Held,* he could recover but half of his loss. *The Drumlanrig* (1910) 79 L. J. P. 100.

Where two ships so collide they must as between themselves divide the loss equally. *The Woodrop-Sims* (1815) 2 Dodson 83; *Hay* v. *LeNeve* (1824) 2 Shaw's Scotch App. 395; *The Sunnyside* (1875) 91 U. S. 208. The principal case follows the English rule, *The Milan* (1861) 1 Lush. 388; *Bank of India* v. *Netherlands Steam Nav. Co.* (1883) 52 L. J. Q. B. 220, which apparently goes upon the ground that the libellant, though himself an innocent party, *The Victor* (1860) 1 Lush. 72, can fix but half the blame on either vessel. The American courts, on the other hand, relying on the analogy of the individual liability of joint tort-feasors at common law, though holding that where both wrong-doers are parties each vessel need pay the libellant only half his loss, *The Alabama and the Game-Cock* (1875) 92 U. S. 695, maintain that as the libellant is to be regarded as blameless, where one only is sued that one must make good the entire loss, *The Atlas* (1876) 93 U. S. 302, whereupon he may call upon the other for contribution. *Erie R. Co.* v. *Erie & W. T. Co.* (1907) 204 U. S. 220. But in view of the libellant's right under the English rule to recover the other moiety in a second action against the other wrong-doer, and as the admiralty rule is quite distinct from that of the common law, *The Milan supra,* this reasoning is not altogether convincing. Since the moiety rule, well established as between negligent colliding vessels, seems to proceed on the theory that where the fault is divided each is responsible only for that part of the loss caused by him, to hold one liable for the full amount would seem inconsistent therewith. Owing to the hardship caused by the American holding, *The Hudson* (1883) 15 Fed. 162, the rule has been adopted that one of two wrong-doers, sued separately, may upon motion have the other made a party. *The Hudson supra;* U. S. Adm. Rule 59. Thus upon principle and policy the principal case seems sound, and avoids the unequal operation of the common law rule as to joint tort-feasors.

ADVERSE POSSESSION—COLOR OF TITLE—RIGHTS OF HEIRS.—The plaintiff claimed to have matured his title under a statute requiring adverse possession for seven years with "color of title," by possession for the full period under a deed to his ancestor, the latter never having

entered. *Held,* the plaintiff could not recover. *Barrett* v. *Brewer* (N. C. 1910) 69 S. E. 614.

Ordinarily "color" is not necessary for the perfection of title by adverse possession. In many jurisdictions, however, upon the principle that one induced to enter upon land by some reasonable written evidence of title should be entitled to greater protection than one who merely claims in defiance of the rights of others, "color" is made a ground for a reduction of the statutory period. *Avent* v. *Arrington* (1890) 105 N. C. 377, 390. Under such statutes this is the sole function of a colorable title, *Avent* v. *Arrington supra,* and obviously it passes no actual interest in the land. Consequently a deed to an ancestor would seem to confer "color" upon the adverse possession of the heir, irrespective of a prior entry, provided the occupation by the latter be in good faith, claiming under the deed. Since a valid deed would place the legal title in the heir, one which supplies sufficient "color" for the ancestor should bring the heir within the reason of the rule. When the adverse claimant has not himself occupied for the full period the additional question of tacking is presented, and an entry and actual possession by the ancestor become necessary. *Hanna* v. *Renfro* (1856) 32 Miss. 125; see *Sherin* v. *Brackett* (1886) 36 Minn. 152. However, in the absence of such circumstances, it is difficult to perceive why an entry by the ancestor should be required. The reasoning of the principal case thus appears to confuse the principles of tacking with those applicable only to color of title.

ATTORNEY AND CLIENT—ATTORNEY'S LIEN—EFFECT OF SETTLEMENT.—The plaintiff, a creditor, whose claim was secured by a mortgage and also by leases assigned as collateral, received payment in full satisfaction of the mortgage, after commencing this action against the lessee for rents. *Held,* the action could not be further prosecuted for the purpose of preserving the lien of the plaintiff's attorney. *Jackson* v. *American Cigar Box Co.* (1910) 126 N. Y. Supp. 58.

Although § 66 of the New York Code of Civil Procedure stipulates that the lien given an attorney upon his client's cause of action cannot be affected by any settlement between the parties before or after judgment, the parties are still free to settle. *Poole* v. *Belcha* (1892) 131 N. Y. 200. In such event the lien attaches to the sum agreed upon, *Shriever* v. *Brooklyn Heights R. R. Co.* (N. Y. 1899) 30 Misc. 145, and the court must enforce it when petitioned by client or attorney. *Matter of King* (1901) 168 N. Y. 53. This summary method of enforcement is, however, available only between attorney and client, and not against a defendant. *Rochfort* v. *Met. St. Ry. Co.* (N. Y. 1900) 50 App. Div. 261. If, as a result of his client's insolvency or for other sufficient cause, the attorney is prejudiced by a settlement made either before, 2 COLUMBIA LAW REVIEW 449, or after judgment, *Baxter* v. *Connor* (N. Y. 1907) 119 App. Div. 450, he may move the court to set aside such settlement and for leave to continue the action to the extent of satisfying his lien. It has been finally settled, moreover, that he may also bring a suit in equity to enforce his lien. *Fischer-Hansen* v. *Brooklyn Heights R. R. Co.* (1903) 173 N. Y. 492. In such an action his client is a necessary party, *Oishei* v. *Pennsylvania R. R. Co.* (N. Y. 1907) 117 App. Div. 110; and the other defendant may interpose any defense available to the client. *Morehouse* v. *Brooklyn Heights R. R. Co.* (1906) 185 N. Y. 520. Judgment therein should provide that execution issue first against the client

and then against the defendant, *Morehouse* v. *Brooklyn Heights R. R. Co. supra,* unless perhaps the former is judgment proof. *Oishei* v. *Pennsylvania R. R. Co. supra.* Since, in the principal case, the settlement was between the plaintiff and a third person it does not fall within the language of the code, and the court properly held that the extinguishment of the cause of action destroyed the attorney's lien.

BANKRUPTCY—DISCHARGE—LIABILITY OF SURETY ON APPEAL BOND.—The defendant appealed from a judgment, giving an appeal bond with surety. Thirteen months later he went into voluntary bankruptcy and was subsequently discharged. *Held,* under the Bankruptcy Act of 1898, c. 541 § 16 (30 Stat. at L. 550), providing that the liability of a surety for a bankrupt shall not be altered by the latter's discharge, the surety was not discharged by the discharge of his principal. *Brown & Brown Coal Co.* v. *Antezak* (Mich. 1910) 128 N. W. 774.

Where an appeal bond or bond to dissolve an attachment is given by the bankrupt more than four months before bankruptcy proceedings, courts differ as to the effect of the bankrupt's discharge upon the liability of the surety. By one view, the surety's obligation is merely to pay the judgment subsequently entered in the event of the principal's default, *Carpenter* v. *Turrell* (1868) 100 Mass. 450, and hence, as a judgment cannot be entered after the principal's discharge, the contingency on which the surety's liability depends can never arise. *Odell* v. *Wooten* (1868) 38 Ga. 224; *Payne* v. *Abel* (Ky. 1870) 7 Bush 344. The majority of jurisdictions, however, maintain that the obligation of the surety is to pay the judgment or debt already existing, unless reversed or satisfied, *Fiss* v. *Einstein* (1878) 5 Mo. App. 78, and consequently that the discharge does not affect his obligation. *Farrell* v. *Finch* (1883) 40 Oh. St. 337; *Hill* v. *Harding* (1889) 130 U. S. 699. The hardship resulting to the judgment creditor from the former view has in one jurisdiction been obviated by statute. *Barnstable Sav. Bank* v. *Higgins* (1878) 124 Mass. 115. While the minority view was tenable upon a narrow interpretation of the term "debt" in the Act of 1867, c. 176 § 33, see *Odell* v. *Wooten supra,* the language of the Act of 1898 would seem to preclude such a construction, *contra, Goyer* v. *Jones* (1901) 79 Miss. 253, which further appears to violate the purpose of the statute and to defeat the intention of the parties. The principal case therefore adopts the preferable doctrine.

CONFLICT OF LAWS—JURISDICTION—INJURIES TO LAND LYING BEYOND THE JURISDICTION.—The plaintiff's land, situated in New Jersey, was injured through the defendant's negligence. The plaintiff brought action in New York to recover damages. *Held,* the court had jurisdiction. *Brisbane* v. *Pennsylvania R. Co.* (1910) 125 N. Y. Supp. 1042. See Notes, p. 262.

CONFLICT OF LAWS—STATE AND FEDERAL COURTS—SERVICE UPON OFFICER OF FOREIGN CORPORATION.—The defendant, a Maine corporation, had never done any business nor owned any property within the state of New York. Service of summons was made on its treasurer as he was passing through the state on his personal business. *Held,* such service was valid and gave the court jurisdiction of the defendant. *Sadler* v. *Boston & Bolivia Rubber Co.* (N. Y. 1910) 140 App. Div. 367.

Within certain limits a state legislature has plenary power to pre-

scribe modes of service. *McCord Lumber Co.* v. *Doyle* (1899) 97 Fed. 22. One of the limits not to be transcended is that no personal obligation shall be imposed upon a defendant not personally served. See *Pennoyer* v. *Neff* (1877) 95 U. S. 714. While the weight of authority holds that an officer not engaged in the business of the corporation cannot be said to carry the corporate entity about with him for purposes of accepting service, some states agree with New York in considering service upon such an officer as valid service upon the corporation. *Jester* v. *Steam Packet Co.* (1902) 131 N. C. 54; *Gravely* v. *Ice Machine Co.* (1895) 47 La. Ann. 389. Such service is in strict conformity to § 432 subd. 1, N. Y. Code Civ. Proc., and has been held valid by the New York courts. *Pope* v. *Terre Haute Car Co.* (1881) 87 N. Y. 137; see *Grant* v. *Cananea Copper Co.* (1907) 189 N. Y. 241, reversing 117 App. Div. 576. The Supreme Court of the United States, on the other hand, in a series of decisions subsequent to the *Pope* case *supra,* has held such service insufficient to give the New York court such jurisdiction as may be recognized by a federal court to which the suit is removed. *Goldey* v. *Morning News Co.* (1894) 156 U. S. 518. These cases, proceeding on the theory that a federal court, as a tribunal of another jurisdiction, may determine the validity of service independently of state legislation or decisions, *Cady* v. *Ass. Colonies* (1902) 119 Fed. 420, are not determinative of the constitutionality of § 432 of the New York Code. Since this question has not come before the Supreme Court on writ of error to the New York Court of Appeals, the Appellate Division was clearly right in following the latter court rather than the federal decisions.

CONSTITUTIONAL LAW—DELEGATION OF POWER BY CONGRESS.—The defendants, who were indicted for selling liquor within a forest reserve contrary to regulations made by the Secretary of Agriculture in accordance with authority granted by an Act of Congress which fixed a penalty for violation of such rules, demurred, alleging that the act was unconstitutional since it attempted to delegate legislative power. *Held,* the statute was constitutional. *U. S.* v. *Rizzinelli* (D. C., D. Id., N. D. 1910) 182 Fed. 675.

Although in general legislative power cannot be delegated, *Field* v. *Clark* (1892) 143 U. S. 649; 10 COLUMBIA LAW REVIEW 60, yet authorized regulations made by executive officers are unobjectionable whenever they may be considered merely supplemental to, *U. S.* v. *Domingo* (1907) 152 Fed. 566, or as a means of enforcing, *U. S.* v. *Bale* (1907) 156 Fed. 687, a law already enacted. In like manner the operation of the law may properly be postponed until the determination of some fact or the happening of a certain contingency, *Field* v. *Clark supra,* even where such contingency consists in the enunciation of a rule by an executive officer. *Dunlap* v. *U. S.* (1899) 173 U. S. 65. Moreover, the delegation of matters of local concern, as a grant of the taxing power to a municipality, 10 COLUMBIA LAW REVIEW 769, or the submission to the referendum of purely local matters have been held constitutional. 7 COLUMBIA LAW REVIEW 61. The federal courts, recognizing that in many fields executive officers can regulate more wisely than Congress, see *Dastervignes* v. *U. S.* (1903) 122 Fed. 30, have in certain cases been especially liberal in sustaining delegations. See *Shannon* v. *U. S.* (1908) 160 Fed. 870; *U. S.* v. *Breen* (1889) 40 Fed. 402. Thus, although a regulation which imposes a penalty would probably be condemned, *U. S.* v. *Domingo*

supra, rules promulgated by the department heads in furtherance of a project outlined by Congress have been sustained. *Boske* v. *Comingore* (1900) 177 U. S. 459; *Stratton* v. *Oceanic Steamship Co.* (1905) 140 Fed. 829. Since in the principal case the punishment for violation of the rules in question was fixed by Congress, the result seems correct and in accord with the unmistakable tendency of the federal decisions.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—STATE AND FEDERAL POWER.—An action was brought under a state statute for a penalty for the failure of the defendant railroad to accept goods for shipment beyond its own line into another State. *Held,* the statute was constitutional even as applied to interstate commerce. *Reid* v. *Southern Ry. Co.* (N. C. 1910) 69 S. E. 618.

Legislation relative to commerce falls into three classes, *Covington etc. Bridge Co.* v. *Kentucky* (1893) 153 U. S. 204, first, purely local regulations, as to which the power of the State is plenary; *Patterson* v. *Kentucky* (1878) 197 U. S. 501; second, state laws only incidentally affecting interstate commerce or in aid thereof, which are valid in the absence of inconsistent Acts of Congress; *Smith* v. *Alabama* (1888) 124 U. S. 465; *Nashville etc. Ry. Co.* v. *Alabama* (1888) 128 U. S. 96; third, regulations which are national in scope, or affect some matter requiring a uniform system of control, or impose a direct burden upon interstate commerce. *Louisville etc. Ry. Co.* v. *Eubank* (1908) 184 U. S. 485. In the last field the power of Congress under the Commerce Clause of the Federal Constitution is exclusive and precludes all state legislation. *Central Ry. Co.* v. *Murphy* (1905) 196 U. S. 197. Tested by the above classification the statute in the principal case, not being national in scope, and not dealing with any matter calling for uniformity of regulation, would fall within the second class and would thus be clearly constitutional as only remotely affecting interstate commerce, unless it should be found to impose some direct burden thereon. But since a railroad, which has not held itself out for such service, is probably not under any common law duty to accept goods for carriage to points beyond its own line, Hutchinson, Carriers § 147; and see *Atlantic Coast Line Ry. Co.* v. *Riverside Mills* (1911) 31 Sup. Ct. Rep. 164, any statute such as that under discussion which compels it to do so would impose a new burden, and if the destination were in another State this burden would bear directly upon interstate commerce. In the principal case, the destination was in fact in a different State from the place of shipment, and in view of the foregoing it would seem that the question whether there was in fact such a holding out by the railroad should have been considered.

CONSTITUTIONAL LAW—POLICE POWER—DEPOSITORS' GUARANTY FUND.—A recent statute of Nebraska required that banking be restricted to corporations and that such corporations should pay a tax of 1% of their deposits, the proceeds to form a fund for the payment of depositors in such banks as should become insolvent. *Held,* the statute was a valid exercise of the police power. *Shallenberger* v. *The First State Bank of Holstein* (1910) 31 Sup. Ct. Rep. 189.

For a discussion of this case as decided by the lower court see 10 COLUMBIA LAW REVIEW 55, where the propriety of the decision as rendered by the Supreme Court is suggested.

CONTEMPT—NEWSPAPER PUBLICATION—PENDING ACTION.—Subsequent to the arrest of a person on a warrant charging him with murder but before he was brought up or charged in the magistrate's court, the defendant published false accounts to the effect that the prisoner had confessed. *Held,* the defendant was guilty of contempt. *Rex* v. *Clarke* (1910) 103 L. T. 636.

The oft-stated rule that a publication to constitute a contempt of court must be made while the action is pending, Rapalje, Contempt 70, does not mean that the trial or hearing must actually be in progress, *Globe Newspaper Co.* v. *Comw.* (1905) 188 Mass. 449, but only that there is a cause and that it has not been finally disposed of. *St. James Evening Post Case* (1742) 2 Atk. 469, 472; *Tichborne* v. *Moslyn* (1867) L. R. 7 Eq. 55 n. 1; *People* v. *News-Times Pub. Co.* (1906) 35 Col. 253. The term "pending" therefore seems to emphasize the fact that the action must not be at an end, *Rex* v. *Parke* L. R. [1903] 2 K. B. 432, 433, 438, inasmuch as a case cannot be prejudiced after it has been finally determined. See *Cooper* v. *Wyatt* (1889) 13 Col. 373, 376. After a criminal cause has been commenced by the issuance of a warrant followed by arrest, *cf. Reg.* v. *Brooks* (1847) 2 Car. & K. 402, there are quite as strong reasons why a publication prejudicing the rights of the defendant or the public should be held a contempt as have led to the adoption of the rule in civil cases. *Cf. St. James Evening Post Case supra.* Interference with the administration of justice being the true test of criminal contempt, 5 COLUMBIA LAW REVIEW 249, the court should protect the rights of the public and of those voluntarily or by compulsion subject to its jurisdiction, as well before an indictment is framed as after. See *Rex* v. *Parke supra,* 437; *Rex.* v. *Davies* L. R. [1906] 1 K. B. 32, 40. Such a publication tending to make more difficult the impaneling of an impartial jury should be punished even though true. *Globe Newspaper Co.* v. *Comw. supra.* The principal case therefore does not extend the power of the court to punish for contempt but merely applies old principles to a new situation.

CORPORATIONS—OVER-SUBSCRIPTION OF STOCK—RIGHTS OF SUBSCRIBERS.—The plaintiff made a payment on an over-subscription of stock of the defendant trust company and was given a receipt therefor signed by its president. The money so paid was applied to the account of a depositor in a bank, from which the defendant's president had extracted funds in order to be able to file an affidavit that the stock was fully paid in. *Held,* two justices dissenting, the plaintiff could recover the amount paid from the defendant trust company. *Higginbotham* v. *International Trust Co.* (1910) 126 N. Y. Supp. 366. See Notes, p. 265.

DIVORCE—LIMITATION OF ACTION—NEW YORK CODE.—The plaintiff, having learned of the remarriage of the defendant, her husband, sued for divorce ten years later under § 1758, N. Y. Code Civ. Proc. The defendant continued to live with his second wife until suit was brought. *Held,* the Statute of Limitations ran from the time the plaintiff learned of the defendant's second marriage. *Ackerman* v. *Ackerman* (N. Y. 1910) 93 N. E. 194.

Previous to any statutory regulation, it was decided in New York upon general principles of equity that a divorce would not be granted where there was either long delay in bringing the suit or long acquies-

cence in the continued adultery of the defendant. *Williamson* v. *Williamson* (N. Y. 1815) 1 Johns. Ch. 488. When statutory conditions were imposed upon the right to bring the action, it was apparently the intention of the revisers to embody the principles of the above case in the statute. Revisers' Notes, 5 Edmonds Stat. at Large 659. The words of the statute, however, are "the plaintiff shall not be entitled to a divorce where the action is not brought within five years after the discovery of the offence charged." Code Civ. Proc. § 1758. It is evident that the revisers failed to give expression to their intent in the statute and hence, the language being plain and unambiguous, this intent should have no weight in the construction. *Johnson* v. *Hudson R. R. R. Co.* (1872) 49 N. Y. 455, 462; see *Keyport Steamboat Co.* v. *Farmers' Trans. Co.* (1886) 18 N. J. Eq. 13, 24. In the early case of *Valleau* v. *Valleau* (N. Y. 1836) 6 Paige 207, however, this principle was lost sight of, the court refusing to grant a decree where the plaintiff had known of the continuous adulterous cohabitation of the defendant for five years previous to the commencement of the action. While the principal case thus adopts the accepted construction of the statute, its intimation in justification of the result reached that continued cohabitation constitutes but one adultery, finds no support in previous New York cases nor elsewhere, and seems wholly unsound on principle. See *Dutcher* v. *Dutcher* (1876) 39 Wis. 651.

ESTOPPEL—SILENCE—CLAIM OF DOWER.—The plaintiff was abandoned by her husband, who later obtained a divorce which the plaintiff did not believe to be legal and remarried. He continued publicly to reside with his second wife until his death and during that time conveyed a number of pieces of land in which the plaintiff now claims dower. *Held,* she was equitably estopped by her long-continued silence. *H. W. Wright Lumber Co.* v. *McCord* (Wis. 1910) 128 N. W. 873.

In those jurisdictions where married women have been freed from the disabilities imposed by the common law, there is no reason why they should not be subject to estoppel. *Godfrey* v. *Thornton* (1879) 46 Wis. 677, 690. In view of the principle on which estoppel *in pais* is based, if silence amounts to a representation and another is misled by his reliance thereon, an estoppel of course results. *Viele* v. *Johnson* (1880) 82 N. Y. 32, 40. Further, in certain instances the mere failure to inform a person about to act of the true state of affairs is sufficient to create an estoppel. In this class of cases it is not enough that some one may act to his prejudice if the truth is not disclosed. There must be both a conscientious duty and an opportunity to speak, *Thompson* v. *Simpson* (1891) 128 N. Y. 270, for there is no obligation to seek out and inform the person about to act. Bigelow, Estoppel 503. It is evident that in order to estop a wife from claiming dower in land purchased without knowledge of her relation to the vendor an estoppel of the latter sort should be shown, and accordingly some courts have held that mere inaction on her part, when the husband is holding forth another woman as his wife, will not deprive her of her dower rights. *Dunn* v. *Portsmouth Bank* (1897) 103 Ia. 538. The majority of jurisdictions, however, in disregard of the ordinary rules of estoppel have placed upon the wife the duty of finding the opportunity of disclosing her true relation, *De France* v. *Johnson* (1886) 26 Fed. 891, the view adopted in the principal case.

EVIDENCE—BURDEN OF PROOF OF SURVIVORSHIP—DEATH IN A COMMON DISASTER.—The administrator of a person who had taken out an accident insurance policy payable to her sister, or, in the event of the latter's prior death, to the legal representatives of the assured, brought suit upon it for the indemnity. It appeared that the insured and her sister had perished in a common disaster; but there was no evidence of survivorship. *Held,* one judge dissenting, the plaintiff could recover. *Dunn* v. *Casualty Co.* (1910) 126 N. Y. Supp. 229. See Notes, p. 268.

FEDERAL JURISDICTION—FEDERAL QUESTION—APPEAL TO SUPREME COURT. —The plaintiff sought to enjoin the enforcement of a municipal ordinance as void because enacted without state authority, but it was enjoined as repugnant to the Federal Constitution. The record proper showed no "claim" of a federal question within the meaning of § 5 of the Act of 1891. *Held,* Justices White, McKenna and Hughes dissenting, the ground of the decision being unfounded in the record, the opinion cannot confer appellate jurisdiction. *City of Memphis* v. *Cumberland Telephone & Telegraph Co.* (1910) 218 U. S. 624.

Although originally the rule was otherwise, *Williams* v. *Norris* (1827) 12 Wheat. 117, the Supreme Court will now examine not only the properly certified opinions of state courts as jurisdictional sources, *Murdock* v. *City of Memphis* (1874) 20 Wall. 590, 633; *Gross* v. *U. S. Mortgage Co.* (1882) 108 U. S. 477, but also those of the circuit courts to determine if it may entertain a direct appeal therefrom under § 5 of the Act of 1891, *Loeb* v. *Columbia Township* (1900) 179 U. S. 472, and if a federal question is actually decided, it is immaterial that the presence of such a question is undisclosed by the record proper. *Mo., K. & T. R. R. Co.* v. *Elliott* (1902) 184 U. S. 531. However, wherever jurisdiction depends solely upon the presence of a federal question, whether it be the original jurisdiction of a federal court, *W. U. Tel. Co.* v. *Ann Arbor R. R. Co.* (1900) 178 U. S. 239, or the appellate jurisdiction of the Supreme Court over a state court, *N. O. Waterworks Co.* v. *Louisiana* (1902) 185 U. S. 366, or the jurisdiction of that Court over direct appeals from circuit courts, *Lampasas* v. *Bell* (1901) 180 U. S. 276, the question involved or claimed must be real and substantial, or else in effect there is no such question. Unless, therefore, by its determination such an invalid or irrelevant question, whether asserted or not by a litigant, is made substantial and real, see *Millingar* v. *Hartupee* (1867) 6 Wall. 258, the principal case presents a logical interpretation of the Act and is in harmony with its purpose. This conclusion is strengthened by the fact that apparently the apellant may still resort to the Circuit Court of Appeals, *cf. MacFadden* v. *U. S.* (1909) 213 U. S. 288, since the decision in the Supreme Court was not on the merits. See *Robinson* v. *Caldwell* (1896) 165 U. S. 359; *Northern Pac. R. R. Co.* v. *Glaspell* (1892) 49 Fed. 482.

GARNISHMENT—PROPERTY SUBJECT TO GARNISHMENT—BURDEN OF PROOF. —Defendant, after service of a writ of garnishment, paid money deposited with it by, and to the credit of, "M, Agent," to M, the plaintiff's debtor. *Held,* since *prima facie* the fund was the property of M, the defendant was liable to the plaintiff. *Silsbee State Bank* v. *French Market Grocery Co.* (Tex. 1910) 132 S. W. 465.

In garnishment proceedings the garnishee's complete protection should ordinarily be the chief concern of a court. Accordingly, the authorities generally recognize in the garnishee a mere stakeholder

whose duty is performed by a full disclosure of the relations between him and the claimant or claimants of the attached property. See *Hanaford* v. *Hawkins* (1893) 18 R. I. 432. Since strangers to the attachment proceedings are not as a rule concluded by judgment therein, *Adams* v. *Filer* (1858) 7 Wis. 265, certain rules have been evolved to minimize the garnishee's hazard of a double liability. Clearly, the garnishor should not succeed unless his debtor could recover from the garnishee in his own right, *Cotton Mills Co.* v. *Savings Bank* (1895) 93 Ia. 654; *cf. Raynes* v. *Benevolent Society* (Mass. 1849) 4 Cush. 343, and therefore the garnishor is put to his proof not only when the garnishee simply denies liability, *Field* v. *Malone* (1885) 102 Ind. 251, but also when he discloses facts which *prima facie* free him from liability, such as notice of a conflicting claim. *Wilhelmi* v. *Hoffner* (1869) 52 Ill. 222. The garnishee need not at his peril establish its validity. *Foster* v. *Walker* (1841) 2 Ala. 177. Further, he is not chargeable on his answer alone unless it clearly admits his indebtedness to the defendant. *Morse* v. *Marshall* (1867) 22 Ia. 290. Without good reason the principal case departed from these rules. Even if the form of the deposit did not show *prima facie* that it was the property of an unnamed principal, it was sufficient to constitute notice to the bank, *Jones* v. *Bank of Northern Liberties* (1863) 44 Pa. 253, and hence to put the plaintiff to proof rather than to force the garnishee to act at its peril. *Ingersoll* v. *National Bank* (1865) 10 Minn. 396. *Cf. Proctor* v. *Greene* (1882) 14 R. I. 42.

HUSBAND AND WIFE—EXPENDITURES FOR NECESSARIES—WIFE'S RIGHT TO REIMBURSEMENT.—A wife, unjustly abandoned by her husband and unable to secure necessaries upon his credit as it was worthless, having purchased them with her own earnings, sought to recover from her husband the amount so expended. *Held,* the wife could recover, being subrogated to the rights of those who furnished the necessaries. *DeBrauwere* v. *DeBrauwere* (1910) 126 N. Y. Supp. 221.

Upon a husband's breach of his common law duty to support, a right inherent in the marital relation enables his wife to pledge his credit for all necessaries. *Cromwell* v. *Benjamin* (N. Y. 1863) 41 Barb. 558; *Hardy* v. *Eagle* (N. Y. 1898) 25 Misc. 471. But if the sale be made upon the personal credit of the wife, the husband is not liable where a married woman is enabled by statute to contract in her own right. *Byrnes* v. *Rayner* (N. Y. 1895) 84 Hun 199. In those jurisdictions which refuse a wife separate maintenance except as incidental to an action for divorce or separation, she is without adequate protection if her husband's credit be worthless, 10 COLUMBIA LAW REVIEW 480, especially where, influenced by the old theory that money is not a necessary, *Earle* v. *Peale* (1712) 1 Salk. 386, the courts refuse to hold the husband liable at law for money loaned the wife. *Marshall* v. *Perkins* (1897) 20 R. I. 34. While generally, where money is loaned for and expended upon necessaries, an equitable action based on subrogation lies against the husband, *Kenyon* v. *Farris* (1880) 47 Conn. 510; *Reed* v. *Crissey* (1895) 63 Mo. App. 184, this seems improper in the case of a cash purchase, since subrogation depends upon the existence of a debt. *Skinner* v. *Tirrell* (1893) 159 Mass. 474. A few cases have, however, allowed a direct recovery at law. *Wells* v. *Lachenmeyer* (N. Y. 1885) 2 How. Pr. 252; *Kenny* v. *Meislahn* (N. Y. 1902) 69 App. Div. 572. In view of the increasing tendency to consider negative enrichment sufficient to permit recovery in quasi-

contract, *McSorley* v. *Faulkner* (1892) 18 N. Y. Supp. 460, these cases and the principal case may be supported on the ground of unjust enrichment. The decision of the principal case, though novel, is a proper extension of the husband's liability.

INSURANCE—CONDITIONS—IMPOSSIBILITY OF PERFORMANCE.—The plaintiff sued on an accident policy which provided that to recover for illness the insured must give notice within ten days after the commencement thereof, alleging as an excuse for nonperformance of this condition, physical and mental inability resulting from the illness. *Held,* the plaintiff could not recover. *Whiteside* v. *North American Accident Insurance Co.* (N. Y. 1911) 2 Daily Record No. 92.

The apparent diversity of opinion as to the effect to be given to conditions in insurance policies when performance is impossible, Richards, Insurance Law 555, may, perhaps, be reconciled by distinguishing between conditions relating to matters prior to the occurrence of the contingency insured against, which must be strictly performed, *Henman* v. *Hartford Ins. Co.* (1874) 36 Wis. 159; *Wheeler* v. *Life Ins. Co.* (1880) 82 N. Y. 543, and those to be complied with afterward for the purpose of securing the indemnity. May, Insurance § 217; see *Peele* v. *Provident Fund Soc.* (1896) 147 Ind. 543. Conditions after time within which notice of loss mut be given are typical of the latter class and while their performance has been sometimes required with like strictness, *Gamble* v. *Accident Ins. Co.* (1869) I. R. 4 C. L. 204, the tendency is to construe them more liberally. Obviously a condition stipulating for immediate notice must be given a more liberal meaning than its literal significance, *Mandell* v. *Fidelity Co.* (1898) 170 Mass. 173, and even where a definite length of time is specified the American courts hold that to insist on a strict compliance under circumstances analogous to the principal case is too unreasonable to be considered within the intention of the parties. *Hayes* v. *Casualty Co.* (1902) 98 Mo. App. 410; *Comstock* v. *Accident Ass'n* (1903) 116 Wis. 382; *Globe Ins. Co.* v. *Gerish* (1896) 163 Ill. 625; *Woodmen Ass'n* v. *Byers* (1901) 62 Neb. 673. So also the specified time has been interpreted to date from the discovery of the accident rather than from its occurrence as required in the policy. *Trippe* v. *Provident Soc.* (1893) 140 N. Y. 23. While the decision of the principal case is logical in its application of strict contractual principles, yet the prevailing doctrine seems to arrive at a more just result without interpreting conditions in the policy more liberally than the New York Courts have previously deemed justifiable. *Trippe* v. *Provident Society supra.*

INSURANCE—STANDARD MORTGAGE CLAUSE—NOTICE OF LOSS.—The plaintiff brought suit on a standard New York fire insurance policy with a standard mortgage clause attached. The policy provided that the "conditions hereinbefore mentioned" should apply to mortgagees. The condition as to notice and proof of loss was subsequent to this provision. No notice or proof of loss was given. *Held,* one judge dissenting, the mortgagee was not bound to furnish notice or proof of loss. *Heilbrun* v. *German Alliance Ins. Co. of N. Y.* (1910) 125 N. Y. Supp. 374.

It is well settled that the standard "mortgage clause" in a fire policy creates an independent contract between the insurance company and the mortgagee. *Hartford Ins. Co.* v. *Olcott* (1881) 97 Ill. 439; 10 COLUMBIA LAW REVIEW 153. Accordingly, under an express provision

of the standard clause it is held that the interest of the mortgagee cannot be defeated by any failure on the part of the mortgagor to comply with the conditions of the policy. *Hartford Ins. Co.* v. *Williams* (1894) 63 Fed. 925. It would seem, however, that the conditions in the policy apply to the mortgagee so far as they are consistent with the provisions in the mortgage clause. Thus the mortgagee must truly disclose title, *Genesee Falls Savings Ass'n* v. *U. S. Fire Ins. Co.* (N. Y. 1897) 16 App. Div. 587, submit to repairs, *Heilman* v. *Westchester Ins. Co.* (1878) 75 N. Y. 7, bring suit within the stipulated time, *American etc. Ass'n* v. *Farmers' Ins. Co.* (1895) 11 Wash. 619, and give at least reasonable notice and proof of loss. *Union Inst. for Savings* v. *Phoenix Ins. Co.* (1907) 196 Mass. 230; *cf. Southern Loan Ass'n* v. *Home Ins. Co.* (1893) 94 Ga. 167. But where, as in the principal case, the policy provides that the conditions "hereinbefore mentioned" shall apply to the mortgagee, it seems a fair inference that the remaining conditions are excluded. *Queen Ins. Co.* v. *Dearborn Savings etc. Ass'n* (1898) 175 Ill. 115. Hence the principal case, while illustrating the tendency to give the insured the benefit of the doubt, seems correctly decided.

JURY—AMENDMENT OF VERDICT BY JURY AFTER DISCHARGE.—The plaintiff sued for damages caused by the defendant's negligence, and the jury, having reported that they were unable to agree, were discharged. Immediately thereafter the judge, discovering that they had agreed that both the plaintiff and the defendant were negligent, the only disagreement being as to the amount of damages, reassembled the jury and entered a verdict for the defendant. A motion for a new trial was denied. *Rippley* v. *Fraser* (N. Y. 1911) 69 Misc. 415.

Although the general rule is that after a jury has been discharged they have no power to alter or amend their verdict, the restriction is obviously a technical one, and in many jurisdictions is subject to the limitation that the jury may amend their verdict in regard to matters of form. *Riley* v. *Williams* (1878) 123 Mass. 506. An alteration, by the jury after their discharge, of the amount of damages awarded has been allowed, *Burlingame* v. *Central R .R. of Minn.* (1885) 23 Fed. 706, and some courts have gone as far as the principal case in allowing amendment. *Ward* v. *Bailey* (1843) 23 Me. 316. There would seem to be a close connection between cases allowing such recall and amendment, and those in which the court has power of itself or on motion to correct the record so as to complete it, or make it express truly the intent of the jury. This the court may do, questioning the jury as to their intent if necessary, *Kreibohm* v. *Yancey* (1900) 154 Mo. 67, and such alteration may be made without the prior consent of the jury where their intent is manifest. *Hobart* v. *Hagget* (1835) 12 Me. 67. Such action has been allowed after their discharge, *Burhans* v. *Tibbits* (N. Y. 1851) 7 How. Pr. 21; *Wells* v. *Cox* (N. Y. 1865) 1 Daly 515, and in cases where the facts were similar to those of the principal case, *Wirt* v. *Reid* (N. Y. 1910) 138 App. Div. 760, which would therefore seem to be a wise departure from the restrictions of the early law. If there is any doubt as to the rights of the case, only the relief of a new trial should be granted, *Dalrymple* v. *Williams* (1875) 63 N. Y. 361, and the discretion of the trial judge should be limited to cases free from any reasonable doubt. *Burhans* v. *Tibbits supra.*

LANDLORD AND TENANT—VALIDITY OF DESIGNATED USE—LESSEE'S LIABILITY FOR RENT.—The plaintiff leased a tenement house to be used as

"a place of amusement for the exhibition of moving pictures and for no other purpose." Subsequently an ordinance prohibited the licensing of such shows located in tenement houses, with the result that the premises could not be put to the designated use. *Held,* the lessee was discharged from liability for rent. *Adler* v. *Miles* (1910) 126 N. Y. Supp. 135.

Where the lease is silent on the point, the demised premises may be put to any ordinary and lawful use to which they are adapted. *Nave* v. *Berry* (1853) 22 Ala. 382. Consequently a lessee's liability for rent under such a lease is not affected where the premises are rendered totally, *Stevens* v. *Wadleigh* (1899) 6 Ariz. 351, or partially useless, *Baughman* v. *Portman* (Ky. 1890) 14 S. W. 342, for the particular purpose for which he leased them whether as a result of inevitable accident, *Jones* v. *Waterworks Co.* (1896) 65 Mo. App. 388; *Lyman* v. *Snarr* (1859) 9 U. C. C. P. 104, or of a change of law. *Abadie* v. *Berges* (1889) 41 La. Ann. 281; *McLarren* v. *Spalding* (1852) 2 Cal. 510. This is equally true where the lease though designating a particular use implies that it may be used for other lawful purposes. *Kerley* v. *Mayer* (N. Y. 1895) 10 Misc. 718; see *Newby* v. *Sharpe* (1878) L. R. 8 Ch. Div. 39. Even where the lease stipulates that the premises are to be used for a particular purpose and no other, see *DeForest* v. *Byrne* (N. Y. 1856) 1 Hilt. 43, the lessee's liability for rent is not altered though their use for that purpose is materially impaired by a change of law. *O'Byrne* v. *Henley* (1909) 161 Ala. 620. When, however, the change of law renders them totally useless, the lessee's liability for rent depends upon whether or not the law will imply a condition. If the change is one that cannot reasonably be supposed to have been within the contemplation of the parties when the lease was made, the law may well imply a condition exempting the lessee from liability; *Baily* v. *DeCrespigny* (1869) L. R. 4 Q. B. 180; but where as in the principal case the use depends upon a governmental license, the better view would appear to be, from the reasoning of the foregoing cases, that a condition will not be implied and the lessee remains liable, since such a change of law could easily have been foreseen. *Houston Ice & Brewing Co.* v. *Keenan* (1905) 99 Tex. 79.

MASTER AND SERVANT—ASSUMPTION OF RISK—STATUTORY DUTY—APPRECIATION OF DANGER.—The plaintiff was injured while feeding an unguarded mangle required by statute to be guarded. She was familiar with the work and knew the danger involved, but did not know that any appliances to lessen the danger were practicable or usual. *Held,* one judge dissenting, it was error to direct a verdict for the defendant. *Tyrell* v. *E. E. Cain & Co.* (Ia. 1910) 128 N. W. 536.

The authorities are divided as to the availability of the defense of assumption of risk where a specific statutory duty has been violated. Available: *Knisely* v. *Pratt* (1896) 148 N. Y. 373; *Birmingham Ry.* v. *Allen* (1892) 99 Ala. 359; *contra, Baddeley* v. *Earl of Granville* (1887) 56 L. J. Q. B. D. 501; *Narramore* v. *Cleveland etc. Ry. Co.* (1889) 96 Fed. 298. Where the defense is held available the further question arises whether the statute alters the ordinary presumptions applicable to assumption of risk. At common law the servant is presumed to assume the risk of all obvious dangers whether inherent in the business or caused by the master's neglect, *Goodes, Adm'r* v. *R. R. Co.* (1894) 162 Mass. 287, such as the risk of machinery negligently left unguarded. *Gorman* v. *Des Moines Brick Mfg. Co.* (1896) 99

Ia. 257, 262. Since the physical situation alone gives rise to such dangers, the presumption is not overcome by the servant's ignorance of the fact that such guards were practicable or usual. *Bier* v. *Hosford* (1904) 35 Wash. 544, 554; *Grief Bros.* v. *Brown* (1898) 7 Kan. App. 394. The danger incident to unguarded machinery does not cease to be obvious because the duty to guard is imposed by statute, *Knisely* v. *Pratt supra,* and it seems that in such a case the usual presumptions arise. *Nottage* v. *Sawmill Phoenix* (1904) 133 Fed. 979; but see 1 Beven, Negligence 645. It is, therefore, difficult to see why the plaintiff's ignorance in the principal case of the practicability of safeguards became material by virtue of the statute; and unless the court was prepared to exclude the defense entirely, the defendant should have had judgment.

NUISANCE—COMFORTABLE ENJOYMENT—FEAR OF DISEASE.—The plaintiff complained of the maintenance of a tuberculosis sanatorium by the defendant, as a nuisance. There was no actual danger of infection, but the general feeling in the neighborhood was such as to cause a diminution in the value of the plaintiff's property. *Held,* as ordinary men entertained a dread of the disease an injunction should be granted. *Everett et ux.* v. *Paschall* (Wash. 1910) 111 Pac. 879.

It is well settled that acts will not be adjudged a nuisance simply because they cause a depreciation in value of adjoining property. Burdick, Torts (2nd Ed.) 400. Anything which disturbs another in the reasonably comfortable use of his premises, however, is commonly considered a nuisance. *Lowe* v. *Prospect Hill Cem.* (1899) 58 Neb. 94. There seems to be no reason for requiring physical as distinguished from mental discomfort in the application of this rule. Thus sights or sounds have been held nuisances not merely because of their physical effect, but also by reason of the mental disturbance resulting from their maintenance. *Farrell* v. *Cook* (1884) 16 Neb. 483. In actions to restrain a dangerous nuisance, the English courts have established the probability of actual harm as the test, apparently disregarding fear which results from the danger as a ground for relief. *Att'y-Gen.* v. *Nottingham* L. R. [1904] 1 Ch. 673; *Crowder* v. *Tinkler* (1816) 19 Ves. 617. American authorities, however, have gone further, granting an injunction regardless of the extent or the certainty of the danger, when the fear excited is a reasonable one. *Baltimore City* v. *Fairfield Imp. Co.* (1898) 87 Md. 352; *Stotler* v. *Rochelle* (Kan. 1910) 109 Pac. 788. While the latter view seems preferable both practically and theoretically, it is clear that neither could properly be invoked when the discomfort is occasioned by purely superstitious or unreasonable fear. In view of the lack of actual danger in the principal case, the fear aroused would seem unreasonable despite the extent to which it obtained in the community; for the prevalence of an act or custom is not conclusive of its reasonableness. *Wabash Ry. Co.* v. *McDaniels* (1882) 107 U. S. 454. The principal case thus seems incorrect. Nor is the problem changed by the operation of the statute, which seems to be merely declaratory of the common law.

NUISANCE—PARTIES IN PARI DELICTO—RECOVERY OVER.—The city, compelled to pay damages for the death caused by an explosion of fireworks arranged for exhibition under the suspension, in favor of political organizations, of an ordinance prohibiting displays of fireworks within the city limits, sought to recover over against the

exhibitor. *Held,* the city could recover over. *City of New York* v. *Hearst* (1911) 126 N. Y. Supp. 917.

A municipality can so recover only when not *in pari delicto* with the principal wrong-doer, *Inhabitants of Lowell* v. *Boston & L. R. Co.* (Mass. 1839) 23 Pick. 24, and it is therefore barred from such relief when it authorizes an act which is a nuisance either *per se,* see *Melkar* v. *City of New York* (1908) 190 N. Y. 481, or because of some other act or fact comprehended by the terms of the license, *Trustees of Geneva* v. *Brush Electric Co.* (N. Y. 1889) 50 Hun. 581, affirmed 130 N. Y. 670, whereas if the permission covers only acts proper if carried out in accordance with its terms it is not without recourse to the licensee, who has exceeded his authority. *Chicago* v. *Robbins* (1862) 2 Black 418; *Port Jervis* v. *First Nat. Bank* (1884) 96 N. Y. 550. In the principal case the suspension of the ordinance was a license, *Landau* v. *City of New York* (1904) 180 N. Y. 48, but the position there taken appears to be that as it cannot be construed as an authority to hold exhibitions of fireworks in any and every place within the city, it must be confined to those held at proper places, and that inasmuch as the place in question was found by the jury to be improper the display there was unauthorized. Thus the principal case is distinguished from *Trustees of Geneva* v. *Brush Electric Co. supra* and brought within the rule of *Chicago v. Robbins supra,* since the locality of the display was the characteristic which made it a nuisance. If this interpretation of the license is correct, the conclusions reached appear to be inevitable. Since it seems that the correct interpretation of the license cannot be that it included every place, however obviously dangerous, the principal case appears to be sound.

Police Power—Regulation of the Suffrage.—A statute provided that any political party all of whose candidates in the aggregate should fail at a primary election to poll for any given official district or division, twenty per cent of the vote cast by such party for governor in such district or division at the last preceding general election, should have the names of its candidates upon the ballot only in the column of independent nominations. *Held,* the statute was constitutional. *State ex rel. McGrael* v. *Phelps* (Wis. 1910) 128 N. W. 1041. See Notes, p. 278.

Rule Against Perpetuities—Severable Limitations—Powers.—The testator devised property to trustees in trust to pay a proportionate share of the income to each of his children, each of whom was given the power to appoint his or her wife or husband to receive such share during his or her widowerhood or widowhood. A gift over of each child's share was then made to grandchildren. *Held,* the gift over was not void for remoteness, unless the appointment was in fact made to a person not *in esse* at the testator's death. *In re Davies' and Kent's Contract* (1910) 79 L. J. Ch. Div. 689. See Notes, p. 270.

Torts—Negligence—Dangerous Animals.—On the trial of an action for injuries caused by driving a horse in so negligent a manner that it ran away, the plaintiff secured permission to amend his complaint by inserting an allegation that the defendant's servant drove the horse in a city street knowing it to be inclined to shy and run away under such circumstances. *Held,* one judge dissenting, the amendment was proper as the cause of action, still being in negligence, had not been changed. *Gropp* v. *Great Atlantic & Pacific Tea Co.* (1910) 126 N. Y. Supp. 211. See Notes, p. 273.

TORTS—PARI DELICTO—RECOVERY FOR CRIMINAL CONVICTION CAUSED BY DEFENDANT'S FRAUD.—The plaintiff bought a concoction from the defendant on the latter's guaranty that it was not intoxicating, and upon selling the same was convicted for selling intoxicating liquor without a license. Thereupon he sued in deceit to recover the total costs of the criminal prosecution. *Held,* public policy forbade a recovery. *Houston Ice & Brewing Co.* v. *Sneed* (Tex. 1910) 132 S. W. 386.

To the general rule that no person can maintain a cause of action which is founded on his own illegal or immoral act there are several well recognized exceptions. The mere fact that the plaintiff was violating the law at the time of the injury does not bar his action. *Steele* v. *Burkhardt* (1870) 104 Mass. 59; *Welch* v. *Wesson* (Mass. 1856) 6 Gray 505. The test is often applied: can the plaintiff establish his case without recourse to the illegal transaction? This test is to-day restricted in tort actions, however, so that the plaintiff will recover if his own act is a condition rather than the proximate cause of his injury; Burdick, Torts 85; *Ill. Cent. Ry.* v. *Dick* (1891) 91 Ill. 434; and its object is merely to find out whether the parties are *in pari delicto, Hinnen* v. *Newman* (1886) 35 Kan. 709, in which event recovery is denied on grounds of public policy. 11 COLUMBIA LAW REVIEW 92. The latter situation does not exist merely because both parties are in fault; the fault must be equal and similar. See 2 Pomeroy, Eq. Jur. (3rd Ed.) § 942. It seems clear, therefore, that the plaintiff should recover where his primary right does not rest on an illegal transaction. *Cf. Hall* v. *Corcoran* (1871) 107 Mass. 251. Where the wrong is civil, a person innocently misled into doing it under a mistake of fact, Burdick, Torts 219, may recover from the instigator. *Moore* v. *Appleton* (1855) 26 Ala. 633; *cf.* 5 COLUMBIA LAW REVIEW 406. The distinction attempted in the principal case between a resultant private wrong and a criminal offence is unsound. *Barrows* v. *Rhodes* L. R. [1899] 1 Q. B. 816, 829. On sound theory, therefore, the plaintiff should recover upon his primary right not to be deceived by the defendant's false representations, and there is no extrinsic reason of public policy for denying him recovery.

TORTS—WRONGFUL ATTACHMENT—WANT OF MALICE.—The plaintiff brought an action on the case to recover damages caused by a wrongful attachment of his property in a suit instituted by the defendant. An instruction that the plaintiff could recover without proof of malice was refused. *Held,* the instruction should have been given. *Talbott* v. *Great Western Plaster Co.* (Mo. 1910) 132 S. W. 15.

The common law provided a remedy for one who had been injured in person or property as the result of the malicious prosecution of a suit at law. 2 COLUMBIA LAW REVIEW 124. No attachment on mesne process was known to the common law, see *Lindsay* v. *Larned* (1821) 17 Mass. 190, but it has generally been provided by statute in the American States, upon the filing of an attachment bond. An action on the case will lie for the wrongful issuing of an attachment, malice and want of probable cause being shown, *Jones* v. *Fruin* (1889) 26 Neb. 76; *Tamblyn* v. *Johnston* (1903) 126 Fed. 267, even though suit could be brought on the bond. *Lawrence* v. *Hagerman* (1870) 56 Ill. 68. And it is clear that an action may be maintained on the bond without proof of malice. *Zeigler* v. *David* (1853) 23 Ala. 127. Because the attachment is a legislative creation and the bond is conditioned upon its wrongful issuing it has been argued that liability, independently of the bond, accrues upon its wrongful as well as

malicious use, *Wilson* v. *Outlaw* (Ala. 1824) Minor 367; *McLaughlin* v. *Davis* (1875). 14 Kan. 168, the bond being to secure the right thus defined. *Jerman* v. *Stewart* (1882) 12 Fed. 266. The statute is given this interpretation in order to give increased safeguard against the loss to property by the extraordinary process of attachment. *Jerman* v. *Stewart supra.* However, it would seem that the statute, in creating a liability for the mere wrongful issuing of the attachment, should be strictly construed as applicable to the bond alone, *Tallant* v. *Burlington Gas-light Co.* (1873) 36 Ia. 262, leaving the liability in an action on the case unchanged; for no reason appears why an injury to property rights by attachment should be considered more serious than an injury to personal rights, see *Lindsay* v. *Larned supra,* or to rights in property injured by other legal proceedings. *Stewart* v. *Sonneborn* (1878) 98 U. S. 192. Thus while the trend of modern authority is in favor of the principal case, see *Botefuhr* v. *Leffingwell* (1900) 21 Oh. C. C. 584, it declares, nevertheless, a rule hard to justify on principle.

WATERS AND WATERCOURSES—DIVERSION FOR PUBLIC USE—COMPENSATION.—The claimant asked for compensation under the Barge Canal Act, Ch. 147, Laws of 1903, because of a diversion of the waters of the Oswego River, a navigable stream, to the purposes of said canal. The claimant owned to the center of the river. *Held,* the claimant was entitled to compensation. *Fulton Light, Heat & Power Co.* v. *State* (N. Y. Ct. of App. 1911) 44 N. Y. L. J. No. 99.

By the common law only those streams were considered navigable which were affected by the tide, and the beds of such streams were presumptively owned by the Crown. See Note to *Ex parte Jennings* (N. Y. 1826) 6 Cow. 518, 536. The fee to the beds of other streams, although navigable in fact, was in the riparian proprietors subject only to the public's easement of navigation. *Orr Ewing* v. *Colquhoun* (1877) L. R. 2 A. C. 839, 846, 871. In the United States the original rule has been extended in many jurisdictions so that all streams which are navigable in fact are navigable in law. See *Packer* v. *Bird* (1891) 137 U. S. 661; *Shively* v. *Bowlby* (1894) 152 U. S. 1. Although the extent of the rights of riparian owners in the waters of a stream, the fee to the bed of which is in the state, beyond the rights of user accorded to the general public, is not clear, see *Rumsey* v. *N. Y. & N. E. R. R. Co.* (1892) 133 N. Y. 79; *Town* v. *Smith* (1907) 188 N. Y. 74, it seems that at common law such owners had no peculiar rights of property in such a stream and that, therefore, the state could divert its waters for the public benefit without making compensation for resulting damage. *People* v. *Canal Appraisers* (1865) 33 N. Y. 461. However the riparian proprietor who owns to the center of the stream possesses well defined property rights incident to his ownership of which the state by a diversion of the waters may not deprive him without compensation, *Smith* v. *City of Rochester* (1883) 92 N. Y. 463, even though the purpose of the diversion is to provide an artificial waterway, see *Commissioners of Canal Fund* v. *Kempshall* (N. Y. 1841) 26 Wend. 404, 421, for on principle it would seem immaterial for what purpose the diversion was made. Since, therefore, the plaintiff in the principal case owned to the center of the stream the decision is sound. See *Avery* v. *Fox* (C. C. 1868) 1 Abb. 246.